In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-279

SEBASTIAN JESSE MIRELEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner pled guilty in the United States District Court for the Southern District of Texas to two counts of filing false federal income tax returns, in violation of Section 7206(1) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(1). He was sentenced to two consecutive terms of three years' imprisonment and fined a total of $10,000. Petitioner then appealed, pursuant to a prior agreement with the United States Attorney, contending that the indictment failed to state an offense and that Section 7206(1) unconstitutionally infringed his privilege against self-incrimination. The court of appeals affirmed (Pet. App. B). Petitioner here renews his constitutional challenge.

The judgment of the court of appeals was entered on July 1, 1974.[1] The petition was not filed until September 16, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. Petitioner's contentions are, in any event, without merit.

1. Petitioner's contention (Pet. 8-9) that Section 7206(1) unconstitutionally infringed his privilege against self-incrimination is based upon a misreading of the statute and a misinterpretation of the indictment.

Section 7206(1), like 18 U.S.C. 1001, punishes only the making of declarations, under penalties of perjury, which the declarant does not believe to be true and correct as to every material matter; it does not compel testimony or otherwise infringe the privilege against self-incrimination in any way. See *Kolaski* v. *United States*, 362 F. 2d 847, 848 (C.A. 5). Cf. *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77.

The indictment charged petitioner with having violated Section 7206(1) by willfully failing to report gross income which he knew that he had received. For purposes of specificity, the indictment described the omitted gross income in question as having been received from the sale of heroin. Petitioner apparently would have this Court construe the indictment as charging him merely with failing to identify the illegal source of his income. But the gravamen of the charge was petitioner's false statement of the amount of his gross income, not his failure to state its source. As in *United States* v. *Garcilaso de la Vega*, 489 F. 2d 761, 765 (C.A. 2), the offense charged was "the failure to report income, not the failure to report the source of the income." This fact was explained to petitioner at the time he made his guilty plea (Tr. of 10/29/73, pp. 6, 10).

---

[1]Petitioner filed an untimely petition for rehearing, but his motion to file out of time was denied on July 29, 1974.

Thus petitioner's underlying contention (Pet. 9-10) is that the Fifth Amendment entitles him to falsify his income tax returns by omitting to report gross income when a statement of the source of that income would be incriminating. The Court rejected an equivalent contention in *Bryson* v. *United States, supra*, 396 U.S. at 72:

> But after *Dennis* [v. *United States*, 384 U.S. 855] it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. [Footnote omitted.]

Petitioner's proper recourse was to report his gross income correctly and to refuse on Fifth Amendment grounds to state the source. *United States* v. *Sullivan*, 274 U.S. 259, 263-264.

2. Petitioner also appears to suggest (Pet. 9) that there was no factual basis for the district court's acceptance of his guilty plea. That contention was not raised in the court of appeals and therefore is not appropriately before this Court. See, *e.g., Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Petitioner's remedy, if he believes that the record fails to show a factual basis for his plea, is to bring a motion to vacate sentence pursuant to 28 U.S.C. 2255.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.